SUPREME COURT, U S

FILED

OCT 29 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-496

RODDIE CROOKS, JR.,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

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Roddie Crooks, Jr., petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above case on July 29, 1974.

OPINION BELOW

The opinion of the Court of Appeals of the State of Washington, Division I (printed in Appendix A hereto, *infra*, pursuant to the provisions of Rule 23(i) of this court) was unreported.

JURISDICTION

The Court of Appeals of the State of Washington, Division I, in an opinion filed April 15, 1974, affirmed the

judgment of the trial court. Timely motion for rehearing was filed by petitioner and was denied on May 23, 1974. Petitioner thereupon filed a timely petition for review in the Supreme Court of the State of Washington and this petition was denied on July 29, 1974 and was entered on July 29, 1974.

This petition for writ of certiorari is filed less than ninety days after the denial of the petition for review.

The petitioner invokes the juridiction of this court under the provision of 28 U.S.C., §1257(3) and United States Supreme Court Rule 19(1)(a).

QUESTION PRESENTED

1. Can a jury be instructed to presume that possession of controlled substances is unlawful and that the burden is on the defendant to prove such possession is lawful?

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV:

(In pertinent part) . . .(N)or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

1. Proceedings Below

Petitioner's petition for review to the Supreme Court of the State of Washington attacked Instruction 6 which reads as follows:

> As used in these instructions, the word "unlawfully" means without and beyond the authority of law.
>
> If you find from the evidence beyond a reasonable doubt that the defendant was in possession of a controlled substance as charged in the information, then

> I instruct you that unless you find evidence to the contrary, the presumption arises that the possession of said controlled substance was unlawful and the burden of showing that said controlled substance was lawfully obtained or unwittingly possessed by the defendant is a matter of defense to be proved by evidence sufficient to raise in your minds a reasonable doubt as to the unlawfulness of defendant's possession of said controlled substance.

Petitioner at that time admitted that this instruction was not excepted to nor error assigned in the Court of Appeals and recognized that the Washington Supreme Court and the Court of Appeals had recently indicated that the presumption therein attacked is constitutional. Petitioner argued, however, that such decisions are in conflict with United States Supreme Court decision in *Leary v. United States,* 395 U.S. 6, 23 L. Ed.2d 57, 89 S. Ct. 1532 (1969) and are of such magnitude as to constitute plain error.

2. Statement of Facts

On August 19, 1972, a package was delivered to United Airlines Air Freight in Portland, Oregon (St. 21). The package was opened by William Rogers, United Airlines employee by means of his picking a lock (St. 22). Mr. Rogers noted balloons, kitchen strainers, a block of some white, chalk-like substance, various prophylactics full of substances of certain types, all of which may be generally described as narcotics paraphernalia (St. 22). He notified the airport police who resealed the suitcase, placed it on a flight to Seattle and notified Seattle police by teletype (St. 27, 28). The suitcase was picked up that same evening by a person later identified as Joycelein Coleman (St. 31). While Ms. Coleman was attempting to redeem the package, defendant Crooks entered the claims office (St. 32).

There was no verbal communication between Ms. Coleman and Mr. Crooks (St. 33). At this time, police officers were observing Mr. Crooks and Ms. Coleman (St. 44). The suitcase was carried to the automobile by Ms. Coleman. As they got near the car, she handed it to Mr. Crooks, who opened the door and placed it on the back seat (St. 53). Shortly after this, Mr. Crooks started to back the automobile out of the parking terminal. The police attempted to apprehend the automobile (St. 53, 54). During the process of apprehension, an object was thrown out of the automobile by Mr. Crooks. It was recovered and turned out to be a small luggage-type key (St. 54, 50, 89). The key did not open the piece of luggage claimed by Ms. Coleman and found in the Cadillac automobile (St. 91). A search of the luggage found certain controlled substances.

REASONS COMPELLING ALLOWANCE OF THE WRIT

1. There Is No Rational Connection Between the Facts Proved In This Case and the Ultimate Fact Presumed by RCW 69.50.506

In *Tot v. United States,* 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241 (1943) the court held that the "controlling" test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the facts presumed." 319 U.S. at 467, 87 L. Ed. at 1524. The court stated:

> Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

The court rejected entirely another suggested test with some backing in the prior case law, according to which the presumption should be sustained if Congress might legitimately have made it a crime to commit the basic act from which the presumption allowed an inference to be drawn.

The presumption under attack in *United States v. Romano*, 382 U.S. 136, 15 L. Ed.2d 210, 86 S. Ct. 279 (1965) authorized the jury to infer from the defendant's presence at an illegal still that he had possession, custody, or control of the still. The court held this presumption invalid. The court concluded, 382 U.S. at 141:

> Presence is relevant and admissible evidence at a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—"The inference of the one from proof of the other is arbitrary . . ." *Tot v. United States*, 319 U.S. 463, 467 . . .

In *Leary v. United States*, 395 U.S. 6, 23 L. Ed.2d 57, 89 S. Ct. 1532 (1969) the court found the effect of *Tot* and *Romano* to be that a "criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36

The presumption involved in *Leary* authorized the jury to infer that anyone in possession of marijuana had knowledge that the marijuana had been illegally imported. The court held unconstitutional that part of the presumption which relates to a defendant's knowledge of illegal importation.

After establishing that a significant percentage of domestically consumed marijuana may not have been imported at all, the court found that it could no longer be postulated, without proof, that possessors would be even roughly aware of the proportion actually imported.

The court concluded:

> . . . (T)hat the "knowledge" aspect of the § 176a presumption cannot be upheld without making serious incursions into the teachings of *Tot*, *Gainey*, and *Romano*. In the context of this part of the statute, those teachings require that it be determined with substantial assurance that at least a majority of marijuana possessors have learned of the foreign origin of their marijuana . . .
>
> 395 U.S. at 52.

In the instant case, the facts proved are that petitioner had fleeting, momentary possession of a suitcase which later was shown to contain controlled substances. The Court of Appeals indicated that this evidence might not alone be sufficient to prove *actual* possession, but the jury was also permitted to consider the circumstantial evidence of petitioner's having the suitcase key in his pocket, which key subsequently proved not to open the lock. From these proved facts, the State contends that the following statutory presumption should arise.

RCW 69.50.506: *Burden of Proof; Liabilities.*

> (a) It is not necessary for the State to negate any exemption or exception in this act in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under this chapter. The burden of proof of any exemption or exception is upon the person claiming it.
>
> (b) In the absence of proof that a person is the duly authorized holder of an appropriate registration or

> order form issued under this act, he is presumed not to be the holder of the registration or form. The burden of proof is upon him to rebut the presumption.

It is submitted that there is no rational connection between the facts proved in this case and the fact presumed under RCW 69.50.506, quoted above. The inference of the one from proof of the other is totally arbitrary, and hence RCW 69.50.506 is unconstitutional in its failure to comport with due process.

An analogous situation was presented in *U.S. v. Vuitch*, 402 U.S. 62, 28 L. Ed.2d 601, 91 S. Ct. 1294 (1971):

> Certainly a statute that outlawed only a limited category of abortions but "presumed" guilt whenever the mere fact of an abortion was established would at the very least present serious constitutional problems under this court's previous decisions interpreting the Fifth Amendment.
>
> (Citing *Tot, Leary*) 91 S. Ct. at 1298

The instant statute, RCW Ch. 69.50, the Uniform Controlled Substances Act, outlaws only a limited category of controlled substances offenses, but as applied, the statutory inference presumes guilt whenever the mere fact of possession is established.

Even if the above statutory presumption is found to meet the "rational connection" test of *Tot, supra*, it is submitted that a "corollary" test must be applied, that is, whether it was more convenient for the defendant or for the government to supply proof of the ultimate fact which the presumption permitted to be inferred. See *Morrison v. California*, 291 U.S. 82, 78 L. Ed. 664, 54 S. Ct. 281 (1934). *Tot* and *Leary, supra*. did not meet this question since the presumptions were held to be unconstitutional applying

the "rational connection" test, but as the *Tot* court stated, "The argument from convenience is admissible only where the inference is a permissible one . . ." 319 U.S. at 469, 87 L. Ed. at 1525. Hence in a situation where the presumption permitted to be inferred bears a rational connection to the facts proved, the convenience test must be applied. In the instant case it is clear that it would be far more convenient for the government to show that petitioner was not the duly authorized holder of an appropriate registration or order form issued under the act since such forms would be on file with the State. It would be totally violative of due process to force this burden upon the petitioner who was shown to possess the controlled substances for approximately fifteen seconds and who testified that he had absolutely no knowledge of the contents of the suitcase. RCW 69.50.506 must therefore be held unconstitutional for failure to meet the "convenience" test.

2. Even If the Statutory Presumptions of RCW 69.50.506 are Constitutional, the Presumptions in Jury Instruction No. 6 are Unconstitutional as Applied, Depriving Petitioner of Due Process and of a Fair Trial

As outlined above, RCW 69.50.506 places the burden of proving certain limited exceptions to the Washington Uniform Controlled Substances Act, such as holding an appropriate registration or order form, upon the person claiming such exceptions. The jury instruction in the instant case, however, goes far beyond the permissible statutory presumptions by stating:

> The presumption arises that the possession of said controlled substances was unlawful and the burden of showing that said controlled substances was lawfully obtained *or unwittingly possessed* by the defend-

> ant is a matter of defense to prove by evidence sufficient to raise in your minds a reasonable doubt . . . (Emphasis supplied).

The effect of the above instruction was to shift the burden of proof to the petitioner as to one of the basic elements of the State's charge, that is, knowing possession of a controlled substance.

As was stated in *Leary*, 395 U.S. at 37:

> With regard to the "knowledge" presumption, we believe that *Tot* and *Romano* require that we take the statute at face value and ask whether it permits conviction upon insufficient proof of "knowledge" rather than inquire whether Congress might have made possession itself a crime.

In the instant case the effect of Instruction No. 6 was to make mere possession punishable, the State having failed to produce any evidence that petitioner knew the contents of the suitcase which he so briefly possessed. If such were the law, the State might rely upon the same presumption unsupported by evidence to convict, for example, a baggage clerk who handled the suitcase longer than did petitioner and with the same lack of knowledge as to its contents.

Turner v. United States, 396 U.S. 398, 24 L. Ed.2d 610, 90 S. Ct. 642 involved the same statutory presumption as did *Leary*, that is, possession of a drug leads to the inference that the possessor knew the drug had been illegally imported.

In considering the heroin charge, the *Turner* court found the statutory presumption to be permissible due to the overwhelming evidence that heroin consumed in the United States is illegally imported. Hence they were forced

to reach the question left open in *Leary* and in their consideration of the cocaine charge as to whether the criminal presumption satisfied the "reasonable doubt" standard.

> Whether judged by the more-likely-than-not standard applied in *Leary v. United States, supra,* or by the more exacting reasonable-doubt standard normally applicable in criminal cases, § 174 is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug.
>
> 396 U.S. at 416.

Barnes v. United States, 412 U.S. 837, 37 L. Ed.2d 380, 93 S. Ct. 2357 (1973) follows *Turner* in the context of a presumption from the defendant's unexplained possession of recently stolen mail that he possessed the mail with knowledge that it was stolen.

> What has been established by other cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfied the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.
>
> 412 U.S. at 843.

The court was also careful to point out that in the present case the challenged instruction only permitted the inference of guilt from *unexplained* possession of recently stolen property. (Emphasis by the court).

Applying the teachings of *Turner* and *Barnes* to the instant situation, it is clear that the evidence necessary to invoke the inference that petitioner knew that the suitcase contained controlled substances was far from sufficient for a rational juror to find the inferred fact beyond a rea-

sonable doubt. In fact, it is undisputed that there is no evidence that petitioner knew of the contents of the suitcase. Further, this is not a situation like *Barnes* involving unexplained possession, but the petitioner offered a plausible explanation of his momentary possession of the suitcase. The effect of the judge's instruction that unwitting possession by the defendant is a matter of defense caused the jury to disregard the petitioner's testimony unless they belived him beyond a reasonable doubt, relying upon an inference which was totally unsubstantiated by evidence to prove an essential element of the crime charged, that is, that petitioner knew what he possessed were controlled substances.

3. The Failure of the State to Prove Beyond a Reasonable Doubt Every Element Necessary to Constitute the Crime Charged is Unconstitutional

The Supreme Court has recently held that the due process clause requires the State in Criminal prosecutions to prove guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 25 L. Ed.2d 368, 90 S. Ct. 1068 (1970).

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. Id at 363.
>
> ° ° °
>
> . . .(T)he due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id*, at 364.

A case virtually on point to the instant situation is *Cool v. United States*, 409 U.S. 100, 34 L. Ed.2d 335, 93 S. Ct. 354 (1972) involving a prosecution for possessing and concealing counterfeit obligations of the United States wherein the defendant asserted that she was not in knowing pos-

session of the bills found on the car floor, and her testimony was corroborated by an accomplice. The trial court, over the defendant's objections, instructed the jury that if it was convinced that such accomplice testimony was true "beyond a reasonable doubt," it should not 'throw this testimony out." The Supreme Court found that the court below held in effect that in a criminal trial, the jury may be instructed to ignore defense testimony unless it believes beyond a reasonable doubt that the testimony is true. The instruction given in the instant case contains a similar negative pregnant, implying that the defendant's explanation as to his unwitting possession of the controlled substances should be disregarded unless such testimony raised a reasonable doubt in the minds of the jury. The *Cool* court found that the instruction given below impermissibly obstructed the exercise of the Sixth Amendment by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable.

> Moreover, the instruction also has the effect of substantially reducing the government's burden of proof . . . By creating an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence, the trial judge reduced the level of proof necessary for the government to carry its burden. Indeed, where, as here, the defendant's case rests almost entirely on accomplice testimony, the effect of the judge's instruction is to require the defendant to establish his *innocence* beyond a reasonable doubt.
>
> 409 U.S. at 104, 34 L. Ed.2d 339.

The fact the instruction in the instant case had the effect of causing the jury to disregard relevant defense testimony by the petitioner himself rather than that of an

accomplice makes the constitutional defect even more apparent.

> Congress can undoubtedly create crimes and define their elements, but it cannot under our constitution even partially remove from the prosecution the burden of proving at trial each of the elements it has defined. The fundamental right of the defendant to be presumed innocent is swept away to precisely the extent judges and juries rely upon the statutory presumptions of guilt . . .
>
> *Turner v. United States*, 396 U.S. at 429 (Black, J., dissenting).

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

RONALD J. MELTZER

HOWARD BECKLER

Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent*, *v.* RODDIE CROOKS, JR., *Appellant*, and JOYCELEIN YVONNE COLEMAN, and each of them, *Defendant*.	No. 2231-1 DIVISION ONE FILE IN CLERK'S OFFICE COURT OF APPEALS STATE OF WASHINGTON— DIVISION I DATE April 15, 1974 s/ HERBERT SWANSON Chief Judge Filed April 15, 1974

JAMES J.—At jury trial Roddie Crooks, Jr. was convicted of four counts of possession of controlled substances in violation of the Uniform Controlled Substances Act.

The evidence presented would permit the jury to find that: A suitcase containing heroin, cocaine, amphetamines and barbiturates was shipped to the United Air Lines air freight office at Seattle - Tacoma International Airport. Crooks drove up to the air freight office and remained in the automobile while a woman passenger went in to claim the suitcase. After a few minutes, Crooks entered the office as the woman was receiving the suitcase, but no verbal communication occurred between them. They walked out of the office together with the woman carrying the suitcase. As they neared the automobile, she handed the suitcase to Crooks who placed it in the back seat of the car. They both got into the car with Crooks behind the wheel

and the woman in the front passenger's seat. As they began to drive away, the police converged to apprehend them. Crooks took a key out of his pocket which fit the suitcase lock and threw it out of the car.

Crooks does not challenge the sufficiency of the evidence. His sole claim of error is that the trial judge refused his request to instruct the jury in part that:

> In order to sustain a conviction on circumstantial evidence the circumstances proved by the State must not only be consistent with each other and consistent with the hypothesis that the accused is guilty, but also must be inconsistent with any reasonable hypothesis or theory which would establish or tend to establish the defendant's innocence.

Defendant's requested instruction No. 1.

His argument is that, because there was no *direct* evidence that he "possessed" the drugs, a cautionary instruction concerning the use of circumstantial evidence we required.

> An accused may be convicted even though all of the evidence of his guilt is circumstantial. In such a case the jury *must* be instructed that the circumstances *must* be consistent with guilt and *must* be inconsistent with innocence.
>
> It is a well established rule that, in order to sustain a conviction on circumstantial evidence, the circumstances proved by the state must not only be consistent with each other and consistent with the hypothesis that the accused is guilty, but also must be inconsistent with any hypothesis or theory which would establish, or tend to establish, his innoncence.

(Emphasis in original. Citations omitted.) *State v. Nabors*, 8 Wn. App. 199, 203, 505 P.2d 162 (1973).

The state contends that Crooks' requested instruction was properly refused because there was direct evidence of both "actual" and "constructive" possession by Crooks.

Under Washington's Controlled Substances Act, guilt may be established by proof or either "actual" or "constructive" possession. One who has "personal," "physical" "custody" has *actual possession. State v. Callahan,* 77 Wn. 2d 27, 459 P.2d 400 (1969). One who does not have "actual, physical possession" but who has "dominion and control over the goods" has *constructive* possession. *State v. Callahan, supra.*

The state argues that the eyewitness testimony that Crooks took the suitcase from the woman and placed it in the car is direct evidence of *actual* possession. Crooks, citing *State v. Callahan, supra,* argues that his brief physical contact with the suitcase was to tenuous to establish actual possession. He asserts that, at most, the state produced evidence of his *constructive* possession. He contends that constructive possession, an abstract legal concept, can *only* be proved inferentially by circumstantial evidence and that, therefore, the state produced no *direct* evidence of possession.

The presence of the suitcase in Crooks' hand is *direct* evidence of "actual possession." Though this evidence may not alone be sufficient to prove *actual* possession under *Callahan,* the jury was also permitted to consider the circumstantial evidence of Crooks' having the suitcase key in his pocket. The jury was thus required to weigh *both* direct and circumstantial evidence of actual possession, and therefore the court's refusal to give the proposed instruction was proper.

In view of this disposition, we need not reach Crooks' contention that constructive possession may *only* be proved by circumstantial evidence.

Affirmed.

Pursuant to RCW 2.06.040, this opinion will not be published.

s/ JAMES, J.

WE CONCUR:

s/ FARRIS, J.

s/ CALLOW, J.